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Supreme Court of the United States

October Term, 1979
No. 79-1506

GEORGE A. LAGUTA, FRANK L. ALBERT,
RONALD J. MYSYK,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE JUDICIAL DISTRICT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent respectfully submits the following additions to the statement of the case.

At 85"A" Gilchrist Road, a business identified as the Expo Construction and Expo Service Company was checked, and it was visibly noticeable that the padlock which normally secured the entrance door was not on the hasp. The building was dimly lit and the padlock was missing from the garage door. It appeared to the officer that the lock

had been forced off because wooden splinters were missing from the door. Officer Rushin turned the handle to the entrance door and found it was unlocked. He entered the building to check for a burglary in progress and noticed several automobile parts, a blue inverted truck cab, tools and wires lying in front of him. In further checking the area he found a green pickup truck, two automobiles sitting on jack stands with numerous body parts around, acetylene torches and other miscellaneous parts. He did not find anyone in the building at that time.

Patrolman Rushin then communicated to the radio operator of the Mogadore Police Department his findings and asked him to contact someone through Public Service to come to the premises to determine if anything was missing from the building and to secure the building. The radio dispatcher advised Rushin that he had no information on that business nor a night security number to contact the owners of the building. Rushin checked his own night security numbers and did not find a listing for the Expo Construction Company. He then re-entered the building to ascertain the license number on the green pickup truck inside the garage in order for the radio dispatcher to see if he could locate the owner. The dispatcher found that the truck had been reported as stolen.

Rushin then returned to the truck and noticed that the ignition lock switch was removed from the dashboard and confirmed that the license plate number corresponded with the vehicle identification number. In checking a vehicle engine which was lying on the floor, the officer found that the vehicle identification number had been buffed from the motor. Officer Rushin also examined the automobile parts which he had earlier observed.

RESPONDENT'S FIRST REASON FOR DENYING THE WRIT

A Police Officer Does Not Conduct an Unreasonable Search in Taking an Automobile's License Number to Locate the Owner of the Building Into Which an Apparently Unlawful Entry Has Been Made.

Respondent agrees with counsel for Petitioners' that the "search and seizure" in the instant case cannot be grounded in the "probable cause and exigent circumstances" exceptions to the warrant provision of the Fourth Amendment to the United States Constitution.

The actions of the police officer were undeniably not within the usual rubric of a "search and seizure." Officer Rushin was not conducting "a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971).

Rather he was attempting to protect private property. The court has previously recognized a community caretaking function which allows this type of police conduct. *Accord, Cady v. Dombrowski*, 413 U.S. 433 (1973), *Harris v. United States*, 390 U.S. 234 (1968), and *Cooper v. California*, 386 U.S. 58 (1967).

While the officers intent, or good faith is not the *sine qua non* of a justifiable intrusion, certainly here his motives cannot be questioned. The courts have established a balancing test weighing the extent of the intrusion against the need for the search. *Terry v. Ohio*, 392 U.S. 1 (1968).

Here the intrusion was extremely limited in both duration and scope. Officer Rushin spent only a few moments to observe a license number. This is in sharp contrast to

an extended rummaging for hours through every possession contained in, or out of sight. *Compare, Marron v. United States,* 275 U.S. 192 (1927), *Cf. Kremen v. United States,* 353 U.S. 346 (1957).

Respondent respectfully requests this court to apply the community caretaker theory to the facts of this case.

RESPONDENT'S SECOND REASON FOR DENYING THE WRIT

A Police Officer's Observation of a License Number of an Automobile, Which He Relays to the Dispatcher to Determine the Owner of the Building Which He Suspects Has Been Unlawfully Entered Falls Within the "Plain View" Exceptions to the Requirement for a Warrant.

Respondent submits that the search conducted herein fits within the test enunciated in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). It is beyond cavil that Officer Rushin was lawfully on the premises, and that the evidence was discovered inadvertently. Petitioners do not contest the officer's lawful purpose. Nor can it be said that he was in any sense looking for evidence of a crime.

Petitioners contend however that the incriminating nature of the evidence was not immediately apparent. *Coolidge v. New Hampshire, supra,* at 468 and *Stanley v. Georgia,* 394 U.S. 557 (1969). Respondent disagrees with this analysis. There was no extensive search, or rummaging through the building to locate evidence of a crime. It is a simplistic view to say that a short span of time to relay the license number to the dispatcher negates the third prong of the *Coolidge* test.

The Court points out in *Coolidge v. New Hampshire, supra* at 467:

> The rationale for the "plain view" exception is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause.
>
> . . . .
>
> The second distinct objective is that those searches deemed necessary should be as limited as possible.

It is readily apparent that this rationale applies to the facts of the instant case. The officer did not enter the premises armed with probable cause in the "competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Second the intrusion into the premises was as limited as the circumstances could require. Under these circumstances the Respondent submits that the "plain view" doctrine has no clear application.

Michigan v. Tyler, 436 U.S. 499 (1978), seems particularly applicable here. In that case firefighters responding to an alarm removed two containers of flammable liquid from the premises while extinguishing the blaze. The court not only sustained that seizure, but went on to hold that as part of their firefighting function, officials could remain in the building, or re-enter it to determine the cause of the fire. Accordingly, evidence seized while inspecting the premises for these purposes is constitutional. *Michigan v. Tyler, supra,* at 510.

The court went on to hold that warrantless entries days after the fire were unconstitutional, and evidence seized was properly suppressed. *Id.* at 511.

In the instant case the trial court granted the motion to suppress as it related to other vehicles, or parts, beyond the vehicle identified initially as stolen by the radio dispatcher. This determination is analogous to *Michigan v. Tyler, supra.* The first object seized was within the framework of the officer's duties vis-a-vis the community. The additional search and seizure can be attributed to his criminal investigative function, and the State concedes that the evidence therefrom should be suppressed.

Accordingly, the Respondent submits that pursuant to the arguments presented above, the search must be sustained.

CONCLUSION

The protections afforded by the Fourth Amendment are not affronted by the very limited intrusion, into the Petitioners' privacy for the benign, or even laudable purpose of protecting their business property. Application of the exclusionary rule to this case would have absolutely no deterrent effect on a police officer's conduct, and would be detrimental to societal interests and their expectations of proper police conduct.

Respectfully submitted,

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